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Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases

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Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases

Robert P. Mosteller[†]

I. INTRODUCTION

I hope that the Supreme Court will ultimately define *Crawford's*¹ testimonial concept in a way that is neither formal nor formalistic,² giving it a reasonably broad scope that covers most accusatory statements in non-confidential settings.³ If my

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¹ *Crawford v. Washington*, 541 U.S. 36 (2004).

² By formal, I refer to the requirements of written or recorded medium for the statement, which is at the heart of the definition proposed by Justices Thomas and Scalia in *White v. Illinois*. 502 U.S. 346, 365 (1992) (Thomas, J., concurring). If the statement defines its testimonial quality, the coverage of the Confrontation Clause is subject to easy manipulation by the police by avoiding such formality. By formalistic, I mean wooden adherence to a set formula rather than a functional approach based on the protective purposes of the Confrontation Clause. The most important feature is the core concern of whether certain witnesses were making criminal accusations against the defendant. Beyond that, a rigid formula should not be imposed. See generally Robert P. Mosteller, “*Testimonial*” and the Formalistic Definition – The Case for an “Accusatorial” Fix, 20 CRIM. JUST. 14 (Summer 2005).

³ At the presentation of the papers for this Symposium, I made comments regarding two topics. My first comments concerned “Testimonial Statements.” I began by expressing trepidation that this critical term may ultimately be defined in an unfortunately narrow, formal, and formalistic fashion. I quoted a conversation from the Vietnam war movie *Platoon*. In a scene that precedes the final devastating enemy attack, “Red” O’Neill approaches his platoon leader, Bob Barnes, who is played by Tom Berringer. Red asks Bob to allow him to leave on one of the last departing helicopters for R&R set to begin only a few days later. After Bob turns him down because every available soldier is needed, Red pleads for reconsideration: “I got a bad feeling on this one, all right? . . . I mean I got a bad feeling!” PLATOON (Orion Pictures 1986).

Red’s plea was not granted, and his bad feeling was accurate. He did not survive the night. I hope that by contrast my fear is misguided.

My major substantive point here is that the definition would be better if it focused on “accusatory” statements rather than “testimonial” ones and that it would be

hope is realized, the restrictions *Crawford* places on evidence will exclude much hearsay evidence that before *Crawford* was received in domestic violence cases, and it will have a somewhat lesser, but still important, impact on hearsay in child sexual abuse cases.⁴ However, as I have argued earlier,⁵ widespread failures of prosecution are neither necessary nor inevitable even if the type of interpretation of *Crawford* that I advocate is adopted.

In cases involving child sexual abuse, prosecutors before *Crawford* often depended on hearsay statements by children to police, other government investigators, and to specialized medical investigating teams. *Crawford*, under my interpretation, will exclude many of these statements because they violate the confrontation rights of the defendant. However, as I describe in Part II, *Crawford* allows admission of such statements if the child testifies at trial and is subject to cross-examination, thus offering a method for prosecutors to ameliorate *Crawford*'s negative impact. As I describe in Part III, in domestic violence cases, victims are often more willing to speak with authorities immediately after the violence than later when they are called to testify at trial. Before the *Crawford* decision, prosecutors introduced hearsay statements made by victims to police and other government agents shortly after the violence. *Crawford*, under my interpretation, will exclude many of those statements, but it allows admission of previously cross-examined statements of unavailable witnesses. Thus, prosecutors may ameliorate the negative impact of *Crawford* in these cases by creating opportunities for victims to give cross-examined testimony close in time to the assault when they are frequently still cooperating with authorities.

My contribution to this Symposium is chiefly about developing the further set of supporting doctrines that are

improved if it at least explicitly included the accusatory concept. I have written about this basic argument in Mosteller, *supra* note 2, and I will not elaborate further here.

⁴ On the other hand, the impact on child sexual abuse cases is likely minimal if the definition of testimonial is narrow, formal, formalistic, and limited to close analogies to the types of statements specifically covered by *Crawford* – “prior testimony at a preliminary hearing, before a grand jury, or at a former trial” and “police interrogations,” *Crawford*, 541 U.S. at 68, also described as “structured police questioning.” *Id.* at 53 n.4.

⁵ In *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005), I argued that important hearsay evidence can continue to be received and criminals can be successfully prosecuted by providing more confrontation and thereby satisfying *Crawford*'s requirements.

necessary to ensure that actual confrontation occurs when hearsay is admitted under the exceptions to *Crawford*, which I suggest may be used to avoid much of its negative impact in cases involving children and domestic violence. When the confrontation right is satisfied by a child taking the stand at the current trial, the right must be understood to require that the prosecution call the witness and attempt to elicit his or her accusation publicly. The Confrontation Clause requires not only the right to cross-examine, but also, as the text itself indicates, the right to be confronted with the witness' accusation. Similarly, when the confrontation right is satisfied in domestic violence cases by prior confronted testimony of an unavailable witness, the right must be understood to require that the prosecution call the witness to make his or her accusation at that other proceeding.⁶ Moreover, the proceeding must have consequences to the government and/or benefits for the defendant. The Clause is not satisfied by the prosecution simply making the witness available at a prior hearing or calling the witness to testify at a pretrial hearing that has no consequences other than to render the testimony admissible if the witness later becomes unavailable. A contrary interpretation would potentially transform the defendant's right to be confronted with witnesses at trial into the inferior and inadequate right to have witnesses made available at some point during the prosecution of the case.

In Parts II and III, I briefly set out that the Confrontation Clause can be satisfied for prior statements of children by the prosecution calling the child to testify at trial, and for unavailable domestic violence victims by affording early opportunities for testimony subject to cross-examination. In Part IV, I develop two requirements that are interrelated in Confrontation Clause theory. First, as to present testimony (often by children), the prosecution must call the witness and ask that witness to state her accusation in court. Second, as to prior testimony by an unavailable witness (often in domestic violence cases), the prosecution must elicit the testimony in a proceeding where the defendant has not only the opportunity, but also the motive, to cross-examine. In Part V, I discuss why it is important to carefully scrutinize the prosecution's claim

⁶ In the rare situation where the defendant voluntarily called the witness at the earlier proceeding, the Clause is satisfied without more. In this situation, the public accusation occurred and the defendant was obviously motivated by some perceived benefit to call the witness.

that a witness is truly unavailable once confronted testimony is received. Greater scrutiny is appropriate because the prosecution's incentive to find and call the claimed unavailable witness is dramatically reduced once such testimony is secured.

II. CONFRONTATION AT THE PRESENT TRIAL: ASSISTING CHILDREN TO BE ABLE TO TAKE THE STAND

I begin with child victims and witnesses in sexual abuse cases. In these cases, *Crawford* can be satisfied most easily by the prosecution working diligently to prepare the child for examination and producing a willing and able child for testimony at trial. If the child takes the stand, testifies against the defendant, and is subject to cross-examination, then there is no Confrontation Clause objection to the admission of prior hearsay statements by the child. End of issue. I call this way of satisfying *Crawford* the *Green-Owens* principle of present confrontation.⁷

This mechanism gives the prosecution the incentive to succeed in preparing the child to testify. This is a practical, safe, and ethical solution because the prosecution is the party that generally has access to the child and is best situated to help prepare the child for testimony. Moreover, the prosecution is likely in the best position to actually produce the child. This method of satisfying *Crawford* motivates the prosecution to make the child available rather than trying to admit hearsay after persuading the court that the child is unavailable or incapable of testifying.⁸

I do not suggest this "solution" is costless. It requires hard work by prosecutors, police, social workers, parents, and caregivers, and could cause the child to suffer emotional trauma. However, I believe this solution works. In situations where prosecutors have statutory incentives to call the child as

⁷ See *United States v. Owens*, 484 U.S. 554, 561-62 (1988); *California v. Green*, 399 U.S. 149, 157-64 (1970). In *Green*, the Supreme Court ruled that the Confrontation Clause is met as to any prior statement by that witness if the witness takes the stand at the present trial, testifies, and is available for cross-examination. 399 U.S. at 157-64. In *Owens*, the Court made this method of meeting the Confrontation Clause easy to meet by ruling that a witness with serious memory loss was still "available" for cross-examination. 484 U.S. at 561-62.

⁸ States may want to change competency statutes and rules to permit constitutionally able children to testify and be cross-examined.

a witness, as they do for instance in Oregon,⁹ prosecutors tend to be successful in preparing the child for testimony.

In these situations, the defense may end up complaining because cross-examination of children is difficult to conduct effectively. The reality is that cross-examining children is challenging in any situation and some defense attorneys may not be up to the task. However, the Confrontation Clause is still satisfied by an uninhibited opportunity to cross-examine, even if this requires a lawyer to exercise substantial skill, judgment, and sensitivity.

III. PRIOR CONFRONTATION: HAVING DOMESTIC VIOLENCE VICTIMS TESTIFY AT EARLY ADVERSARIAL PROCEEDINGS

In domestic violence cases, the ameliorative analogue to the child victim testifying in sexual abuse cases is to provide opportunities for early confrontation, which *Crawford* recognizes as satisfying the Confrontation Clause for unavailable witnesses.¹⁰ I call this the *past confrontation plus present unavailability* principle.¹¹

Often in these cases, the victim is cooperative with the prosecution and more willing to testify immediately after the violence, but that cooperation and willingness diminish over time. Thus, if the victim's testimony could be received soon after the violent event, complete with an opportunity for cross-examination, the victim's testimony would likely be more forthcoming. Further, that testimony would be admissible under *Crawford* if the witness later becomes unavailable.

This mechanism for meeting *Crawford* has an additional benefit. Frequently, perpetrators will, in one fashion or another, coerce their victims either not to appear at trial, or to be uncooperative or uncommunicative if they do appear at trial. After confronted testimony has been given, however, the defendant loses much of the incentive to coerce or intimidate the victim into not appearing. Indeed, with the

⁹ Oregon Evidence Rule 803(18a)(b) provides that *all* prior statements of a child in sexual abuse cases are admissible if the child testifies and is subject to cross-examination. OR. R. EVID. 803(18a)(b) (2005) (codified at OR. REV. STAT. § 40.460(18a)(b) (2005)). This rule creates a hearsay exception for children in sexual abuse cases that includes all statements admissible under the *Green-Owens* principle of present confrontation.

¹⁰ *Crawford*, 541 U.S. at 54, 57.

¹¹ Professor Tom Lininger, who is part of the Symposium, has written about this option. See Tom Lininger, *Prosecuting Batterers after Crawford*, 91 VA. L. REV. 747 (2005).

confronted testimony “in the can” for use if the victim does not appear and testify, the defendant may have the positive incentive to have the victim appear and provide exculpatory testimony. While that testimony may be false, presumably the trier of fact will generally be able to separate truth from lies given the obvious explanation for the change in story. Thus, either prior confronted testimony will be admitted if the witness is unavailable, or live testimony will take its place, and the *Green-Owens* principle of present confrontation will allow admission of the prior statement. In either case, more confrontation will lead to more admissible evidence.

IV. THE INTER-RELATED REQUIREMENTS OF (1) AFFIRMATIVE TESTIMONY AT THE PRESENT TRIAL IN CHILDREN’S CASES AND (2) THE PROSECUTION ELICITING TESTIMONY AT A PRIOR HEARING WHERE THE DEFENDANT HAS BOTH OPPORTUNITY AND MOTIVE TO CROSS-EXAMINE IN DOMESTIC VIOLENCE CASES

Several courts, including *State v. Snowden*,¹² have rejected the argument¹³ that under the *Green-Owens* principle simply having the declarant available to be called by the defendant at trial satisfies the Confrontation Clause. These courts have gotten the point right. However, sometimes they stated the argument in the negative – the defendant has no obligation to call a witness to make hearsay evidence admissible and thereby prove the state’s case,¹⁴ or that it is the state’s burden to make the testimony admissible.¹⁵ *Snowden* goes further by making the important positive argument, “In a criminal trial, the State is required to place the defendant’s accusers on the stand so that the defendant both may hear the accusations against him or her stated in open court and have the opportunity to cross-examine those witnesses.”¹⁶

In an earlier article, I detailed a more elaborate argument for this absolutely correct point.¹⁷ The proposition is supported by the wording of the Confrontation Clause itself,

¹² 867 A.2d 314, 332-33 (Md. 2005).

¹³ See also *State v. Cox*, 876 So. 2d 931, 938-39 (La. Ct. App. 2004); *Bratton v. State*, 156 S.W.3d 689, 693-94 (Tex. Ct. App. 2005).

¹⁴ *Cox*, 876 So. 2d at 938.

¹⁵ *Bratton*, 156 S.W.3d at 694.

¹⁶ *Snowden*, 867 A.2d at 332 (citing *Coy v. Iowa*, 487 U.S. 1012 (1988)).

¹⁷ See Mosteller, *supra* note 5, at 578-86.

which requires that the defendant be “confronted with” the witnesses against him, rather than merely having the right “to confront.”¹⁸ The proposition is stated in many of the Supreme Court’s articulations of the right and also in culturally important quotations about confrontation that the Court has cited. All of these sources inform us that a defendant has a right to face the accuser as that person is making his or her accusation.¹⁹ Further, the proposition is supported by the historical writings available to the Framers, which contrasted the despised inquisitorial methods with the obvious benefits of the English common law method of proof, where witnesses testify orally in open court before the defendant. Thus, witnesses made their accusations there and then as opposed to making them in private and having them recorded with the clear potential for government manipulation and distortion.²⁰

It is critical to recognize that the right of confrontation requires a public accusation. This point has direct application to the way I interpret the Confrontation Clause and the way *Crawford* should be satisfied in child abuse cases. As discussed below, it also has important implications for how to define and limit the right through prior testimony in an adversarial setting. The Confrontation Clause may be satisfied as to a prior statement by what occurs at the present trial, or if the declarant is unavailable, by what occurred at a prior hearing. Importantly, in both situations, the right to be “confronted with” the witnesses against the defendant must be met. This means that, first, the accuser must stand in the defendant’s presence and be called upon to make his or her accusation, and second, the defendant must have a chance to cross-examine. Both components are required.²¹

A common situation at apparent odds with the right I have just described occurs when the accuser denies the accusation, but the Confrontation Clause is still held to be

¹⁸ U.S. CONST. amend. VI.

¹⁹ See, e.g., *Coy v. Iowa*, 487 U.S. 1012, 1016-19 (1988) (quoting numerous statements from various sources that provide not only cross-examination but the right to be faced with the accusation in the first instance); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (noting the similarity between the Sixth Amendment right and a statute specifying that the accused is to be tried using only such “witnesses as meet him face to face at trial, who give their testimony in his presence, and give the accused an opportunity of cross-examination”); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (including both “personal examination and cross-examination”).

²⁰ 3 WILLIAM BLACKSTONE, COMMENTARIES 373-74 (1783).

²¹ This is the unmistakable point of the quotations from *Mattox*, *Dowdell*, and *Coy* discussed *supra* note 19 and accompanying text.

satisfied by the witness' present "accusation" and cross-examination. Does that denial fail the test of accusation, and if it does not, how do I justify the result while maintaining my general point that accusation is required?

I believe there is no requirement in the Confrontation Clause that, when standing before the defendant and asked by the prosecution to make the accusation, the accuser must in fact incriminate the defendant. I will use the well-known example – actually the counterfactual example – of Sir Walter Raleigh to illustrate this point.

The basic facts of the Raleigh story are generally well known in circles familiar with the Confrontation Clause debate. The part of the story I am referring to, stated in brief, involves Lord Cobham's accusations to the Privy Council implicating Raleigh in a plot to overthrow the crown. These were received in "testimonial" form in Raleigh's trial. Raleigh repeatedly complained during that trial that Cobham should be brought before him to make his accusations, believing, as Cobham had previously communicated to Raleigh by letter, that he would publicly recant those accusations.²²

My assumption is that had Cobham been produced by those trying Raleigh, the sense of justice of his contemporaries, the Framers, and modern observers would have been satisfied, at least as a matter of confrontation. This would have remained true even if Cobham had said in his testimony that none of his prior statements were true, and Raleigh's judges had nevertheless relied on Cobham's earlier statements to convict. That certainly was the position of the Supreme Court in *California v. Green*.²³

The Confrontation Clause requires the prosecution to call the witness on direct, so that in most cases the accusation will be presented directly to the defendant's face. In those cases where the witness repudiates her accusation, that denial has a practical and a constitutionally significant impact: it is

²² See *California v. Green*, 399 U.S. 157, 157 n.10 (1970); 30 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 6342, at 258-69 (1997). It should be noted that Cobham had also written to the prosecutors that his recantation was false and had been provided because Raleigh requested it. 1 DAVID JARDINE, *CRIMINAL TRIALS* 444-46 (1832).

²³ The Court in *Green* stated: "So far as appears, in claiming confrontation rights no objection was made against receiving a witness' out-of-court depositions or statements, so long as the witness was present at trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact." 399 U.S. at 157 (emphasis added).

made in open court and in the presence of the jury, without any filter by the prosecution, and it tends to damage the prosecution's case. Thus, the defendant either is confronted with the accusation, or, as Raleigh had hoped, the prosecution suffers the harm of presenting a witness who exculpates the defendant and thereby damages the government's case.

Again, my general proposition is that the Confrontation Clause requires that *at one point in the trial* the defendant must have a face-to-face accusation (or repudiation of the charges) by the witness in open court and the defendant must have an opportunity to cross-examine that witness about the accusations. I believe this understanding of the right has implications as well for the situation where the witness is unavailable and the confrontation right is satisfied by what occurred at a prior proceeding. To be sufficient, what occurred at that prior proceeding must itself meet this model of both public accusation and cross-examination.

In general, for prior testimony to be admissible the prosecution is first required to hold a hearing and call the accusing witness to testify. The hearing should be satisfactory, even if held very early in the case, provided that it offers some potential benefit to the defendant, which motivates him to cross-examine the witness and places the basic question of guilt or innocence in some way at issue. This is true even though it is not a mini-trial where guilt or innocence will be directly decided. I believe a preliminary hearing or a motions hearing will suffice where lesser consequences are involved as long as the proceeding matters to both sides. For instance, current law holds that preliminary hearings qualify even in jurisdictions where the consequence of a dismissal of charges for lack of probable cause is only the temporary freedom of incarcerated defendants.²⁴ Thus, the prospect of eliminating conditions on the terms of release or other restrictions on the defendant's movement, which are conditions that are generally applicable

²⁴ See 1 MCCORMICK ON EVIDENCE § 302 at 288 & n.5, § 304 at 297 & n.8 (John W. Strong ed., 5th ed. 1999). The United States Supreme Court approved use of prior testimony from a preliminary hearing in both *California v. Green*, 399 U.S. 149 (1970), and *Ohio v. Roberts*, 448 U.S. 56 (1980). No distinction is drawn in these cases between examinations at preliminary hearings satisfying the hearsay rule under prior testimony and the Confrontation Clause nor between jurisdictions where dismissal at the preliminary hearing simply affects the immediate liberty of the defendant (e.g., federal prosecutions) and those where dismissal may have broader implications for continued prosecution of the case (e.g., California).

in domestic violence cases, should be a sufficient incentive for the defendant.

Although developed principally in the context of a hearsay rule rather than for Confrontation Clause purposes, I believe that the requirements associated with the prior testimony exception to the hearsay rule²⁵ capture the essence of what should be sufficient, and frequently, what is required. There must be a prior hearing at which the witness is either called on direct examination by the prosecution or is voluntarily called as a witness by the defendant. The defendant must have an opportunity to cross-examine,²⁶ and if given a motive to do so, his failure to cross-examine for tactical or strategic reasons will not render the testimony constitutionally inadmissible.²⁷

In general, imperfections in the opportunity to cross-examine arising from factors such as a lack of full discovery at an early stage in the proceeding should not be *per se* barriers to admissibility; rather, the test should be the overall adequacy of the opportunity.²⁸ Perfection should not be required because the hearing is being held to satisfy a legitimate criminal justice purpose. Thus, when later events cause the witness' unavailability, reliance on a second-best method of meeting confrontation is justified.

Legislative changes may be necessary to create such early adversarial hearings in domestic violence cases. For example, many domestic violence cases involve only misdemeanor charges, for which preliminary hearings are not even authorized in most jurisdictions. In some jurisdictions, the procedures at preliminary hearings may provide inadequate opportunity for cross-examination on issues going

²⁵ See FED. R. EVID. 804(b)(1) (requiring opportunity and similar motive to develop the testimony).

²⁶ If the defendant voluntarily calls the witness, conducting direct and redirect and challenging the witness, and if the testimony is incriminating, the prior testimony exception to the hearsay rule is satisfied. See *Ohio v. Roberts*, 448 U.S. 56, 67-71 (1980) (ruling that the examination of the witness called by the defense attorney constituted an adequate opportunity to confront the witness even though she was never declared a hostile witness). Cf. FED. R. EVID. 804(b)(1) (treating the opportunity to conduct direct and redirect as sufficient for admission of prior testimony).

²⁷ See MCCORMICK, *supra* note 24, § 304 at 298 (observing that as to prior testimony "judgments to limit or waive cross-examination at the earlier proceeding based on tactics or strategy, even though these judgments were apparently appropriate when made, do not undermine admissibility [if] the operative issue in the prior proceeding [was] basically similar and if the opportunity to cross-examine was available").

²⁸ See *supra* note 24.

to guilt or innocence, and therefore may render testimony from these hearings inadequate or problematic as an exception to *Crawford*. For example, in *People v. Frye*,²⁹ the Colorado Supreme Court held that restrictions on the scope of examination in that state rendered preliminary hearings inadequate to meet the requirements of the Confrontation Clause. Further, the court declined to expand generally the allowable scope of cross-examination to rectify the inadequacy it perceived under the Confrontation Clause because doing so would have altered the nature of preliminary hearings across the system.³⁰ Whether or not *Frye*'s ruling is correct regarding the adequacy of the state's preliminary hearing under the United States Constitution, its broader point is sound. Changes may be necessary to ensure that early hearings provide adequate opportunity for cross-examination, and these changes will have other ramifications for trial proceedings. Specifically, in order to conserve judicial resources, legislatures may want to provide for preliminary hearings in misdemeanor cases, but do so only in domestic violence prosecutions. Further, they may want to grant broader rights of cross-examination or discovery to ensure that challenges to the adequacy of the opportunity to cross-examine can be overcome.

States may also want to prohibit the waiving of a probable cause hearing by the defendant,³¹ which I believe the states can do constitutionally. As I argued earlier, I do not believe the rigorously enforced Confrontation Clause developed in *Crawford* as applied to testimonial statements is satisfied by simply giving the defendant an opportunity to call and examine the witness. This is because the state, while offering the opportunity, ventures nothing and offers no benefit. In this situation, the defendant is not faced with an accuser, but instead by either asking or not asking questions, he or she is forced to validate admission of even the most damning testimonial statements. This is not constitutionally adequate.

The situation where the defendant wants to avoid a hearing in which the witness' testimony will be presented and cross-examination allowed, while exhibiting some superficial similarity to the defendant's failure to call an available

²⁹ 92 P.3d 970, 981 (Colo. 2004).

³⁰ *Id.* at 978.

³¹ See *State v. Whitehead*, 950 P.2d 818 (N.M. Ct. App. 1997) (ruling that under existing statutory and state constitutional provisions the prosecution could not prevent the defendant from waiving a preliminary hearing).

witness, is quite different. If the prosecution is willing to call the witness and risk losing something of consequence, the defendant should not be able to avoid admission of prior statements by refusing to participate. The prosecution should be able to call a witness to present her or his accusations in public and in the presence of the defendant and then stand available for challenge through cross-examination. If the objective defendant would have a motive to secure favorable testimony from this witness, the confrontation right should be satisfied. The defendant should not be able to avoid, by waiving the hearing for tactical or strategic reasons, a real opportunity to confront the accuser.

As stated above, I believe that the prior proceeding must involve calling the witness for face-to-face accusation. In cases where the testimony is a repudiation of the accusation, the resulting damage is the prosecution's. Importantly, this means that simply affording the defendant a chance to examine the witness in a deposition is not sufficient. It also means other prior statements must be presented at the prior adversarial hearing so that the defendant has the opportunity to cross-examine the witness about them.

Merely making the witness available for a deposition to be taken by the defendant should not satisfy the Confrontation Clause.³² This is little different than the situation *Snowden* properly rejected, where the witness was available but was not called as a witness by the state.³³ It is not the responsibility of the defendant to make prior testimony admissible by securing

³² The intermediate courts of appeal in Florida are in conflict regarding whether discovery depositions satisfy the right of confrontation. In *Lopez v. State*, the First District held that the opportunity to conduct a discovery deposition did not satisfy the confrontation right because of the inadmissibility of the deposition as substantive evidence under state law, the absence of the defendant's right to be present, and the larger implications of a contrary holding to erase the confrontation right if the witness was available for a discovery deposition at any time before trial. 888 So. 2d 693, 700-02 (Fla. Dist. Ct. App. 2004). By contrast, the Fifth District reached a different conclusion in *Blanton v. State*, 880 So. 2d 798 (Fla. Dist. Ct. App. 2004) (ruling on rehearing motion). In that case, the defendant had taken the witness' deposition, and the court treated it as sufficient to satisfy the confrontation right. *Id.* at 801.

³³ In *Snowden*, the state argued that the defendant waived his confrontation right because he did not call a declarant as a witness even though she was present in the courthouse, although she was not in the courtroom until released by the judge following the ruling on the admissibility of the hearsay statements. 867 A.2d 314, 330-31 (Md. 2005). The court rejected the argument. *Id.* at 332-33. This situation is thus functionally indistinguishable from the argument that if the defendant could have called a witness for a deposition but does not do so, he or she waives the confrontation right when the witness' prior statement is presented at trial without that witness taking the stand.

cross-examination. Rather, it is the responsibility of the government to ensure that the witness confronts the defendant with his or her accusations; then it becomes the defendant's responsibility to cross-examine the accuser or face a ruling that the defendant's right has been satisfied by the opportunity, even if he or she failed to take advantage of it.

Conversely, a deposition to preserve testimony may qualify in some situations. In this scenario, the prosecution calls the witness on direct examination, and the defendant is allowed fully to cross-examine on all issues relevant to guilt or innocence. The resulting testimony may be admitted by either side if the witness becomes unavailable.³⁴ In addition to the obvious potential benefits for the prosecution, this type of deposition may have negative consequences and commensurate benefits to the defendant if the witness' testimony is exculpatory. Finally, since it entails calling the witness to make his or her accusation in public, it satisfies the Confrontation Clause.

However, this type of deposition is of more limited utility than an early preliminary hearing because such depositions should not be authorized unless there is a concrete justification for believing that the witness' testimony must be preserved at an early time.³⁵ Cross-examination opportunities for the defendant should not be routinely diminished. Accordingly, it is hard to justify a very early examination when defense counsel is not adequately prepared or has not received full discovery. Why should such a clearly inferior opportunity to cross-examine be imposed on the defendant without a triggering emergency? If it can be, I argue that the prosecution must be required to conduct another deposition if the witness remains available once discovery has been completed and the defense counsel has prepared for trial. Thus, although this sort of deposition is a potential vehicle for recording and admitting prior testimony, it is not likely to be generally available. Even

³⁴ *Lopez* suggests a different ruling for depositions designed to perpetuate testimony admissible at trial. 888 So. 2d at 700 (citing *State v. Basiliere*, 353 So. 2d 820 (Fla. 1977)).

³⁵ FED. R. CRIM. P. 15(a) allows such a deposition after indictment, but only in extraordinary circumstances and with some procedural protections. These requirements do not necessarily relate to any constitutional concern, but they do tend to reduce the range of potential conflict with the Confrontation Clause.

if constitutional, I suggest that broad use is contrary to sound public policy.³⁶

As noted above, I believe another restriction must be imposed on testimony received at these prior hearings. Other prior statements of the witness must be offered in evidence at that hearing to satisfy *Crawford* through the principle of prior testimony and present unavailability.³⁷ I argue that a prior statement, if it is testimonial under *Crawford*, must at some point meet the requirements of the Confrontation Clause – either by what happened at the prior hearing coupled with present unavailability or by what happens at the present trial.

As to statements that are not offered at the prior hearing by the prosecution, there is no accusation and likely no opportunity to cross-examine. As to statements that are unknown at the time of the hearing, the failing is even clearer. In both situations, I contend the right has *not* been satisfied. Unlike the situation that exists when the witness is on the stand at the current trial where potentially all prior statements can be admitted, the mere fact that a witness has been cross-examined previously about an incident does not render admissible all prior statements about that incident. For such statements, an accusation has not been made and no

³⁶ We have relatively little case law on the constitutionality of prior testimony given in situations where the witness testifies on direct examination and the defendant is allowed fully to cross-examine on issues relating to guilt or innocence, but the defendant's only motive to examine is that the testimony will be admissible if the witness is unavailable at trial. See *United States v. Zurosky*, 614 F.2d 779, 791-93 (1st Cir. 1979) (concluding that the Confrontation Clause was not violated where the trial judge, predicting correctly that the witness would claim the Fifth Amendment at trial, invited counsel for the co-defendants whom the witness had directly implicated to fully cross-examine him). But cf. *United States v. Taplin*, 954 F.2d 1256, 1258-59 (6th Cir. 1992) (ruling in somewhat similar context that FED. R. EVID. 804(b)(1) was not satisfied).

FED. R. CRIM. P. 15 may come into more frequent use as a way to deal with the separate concerns of foreign nationals who are incarcerated in the United States as material witnesses and who have an interest separate from the defendant to be deposed so that they may be released. The government has an interest in making certain they are subject to cross-examination and that the hearing meets the requirements of the Confrontation Clause so their testimony may be admitted at trial if the witnesses are unavailable, as presumably many foreign nationals will be. See, e.g., *United States v. Lai Fa Chen*, 214 F.R.D. 578 (N.D. Cal. 2003) (finding exceptional circumstances to justify granting the request for a material witness deposition). These procedures certainly operate on the premise that a defendant may be put in a position where he or she must cross-examine the witness brought to a deposition and examined by the government or lose the opportunity to confrontation and have the testimony admitted without cross-examination.

³⁷ See, e.g., *People v. Price*, 15 Cal. Rptr. 3d 229, 239 (Ct. App. 2004) (finding satisfaction of the Confrontation Clause where defendant exercised opportunity to cross-examine witness regarding prior statement).

opportunity to cross-examine has been afforded. However, since the test here is providing the defendant with a meaningful opportunity for cross-examination, some minor changes in the facts that the witness testified to at the prior hearing, which may be contained in a hearsay statement by the witness, should be permitted if the right to cross-examine has been substantially afforded.³⁸

V. THE TROUBLING INCENTIVE FOR THE PROSECUTION TO ACCEPT THE WITNESS' UNAVAILABILITY ONCE PRIOR CONFRONTED TESTIMONY HAS BEEN SECURED

I worry that once prior confronted testimony of a witness has been secured, pressure that would otherwise be felt by the prosecution to secure the presence of that witness will be substantially diminished, and the effect will be a decreased effort to produce the witness for present testimony. In *Ohio v. Roberts*,³⁹ Justice Marshall argued in dissent that the government's efforts to find the missing witness were inadequate and contended that far more would have been done had the state not satisfactorily obtained testimony from the preliminary hearing.⁴⁰ One need not ascribe unethical motives to the prosecution: it is human nature that most people work harder when success is at stake and less hard when the materials for success have already been acquired. Thus, if prior confronted testimony is more frequently recorded in domestic violence cases, it is safe to assume that the prosecution will work somewhat less hard to secure the presence of victims in those cases. I have suggested that the defendant's incentives may compensate in some situations to bring victims to court, but that possibility should not relieve the government of its obligation to demonstrate real

³⁸ See *People v. Ochoa*, 18 Cal. Rptr. 3d 365, 373 (Ct. App. 2004) (raising issues regarding statement not offered at prior hearing), *review granted*, 101 P.3d 478 (Cal. 2004). In *Ochoa*, the Court of Appeals found cross-examination at the preliminary hearing adequate as to a prior statement that was not introduced at that hearing where the prior statement was brought to the defendant's attention before the preliminary hearing and its contents appeared to overlap considerably with evidence offered at that hearing. Without more detail than the opinion provides, it is difficult to determine whether this case is rightly decided at least as a matter of harmless error. If not, I question whether the failure of the defense to cross-examine on a statement not offered by the prosecution should satisfy the Confrontation Clause.

³⁹ 448 U.S. 56 (1980).

⁴⁰ *Id.* at 79-80 (Marshall, J., dissenting).

unavailability only *after* adequate efforts to locate and produce the witness.

My point is that if we move in the direction of securing more prior confronted testimony, courts will need to be vigilant to ensure that the prosecution does indeed satisfy its constitutional obligation to show that the witness is unavailable. I am not suggesting a draconian standard. Indeed, it is hard to articulate a specific standard to apply. However, courts should view the government's claim in the way Justice Marshall suggested: Is the showing adequate in the sense that the government worked roughly as hard to find and produce the witness as it does in cases where the witness is needed to prove the prosecution's case?⁴¹ Systemic reduction in effort should not be tolerated.

VI. CONCLUSION

Regardless of the breadth of the definition of testimonial, *Crawford* will impact the ease with which prosecutors secure convictions. Cases involving child sexual abuse and domestic violence are particularly susceptible to negative consequences because they often critically depend on hearsay to prove the case. Domestic violence cases in particular rely on statements especially likely to be considered testimonial because they are given to government agents in a context that suggests to everyone involved that a criminal prosecution is likely to ensue.

A broad negative impact on prosecution of these cases is not, however, inevitable. More confrontation can be provided while prosecutions successfully continue. This Comment is largely about the important ancillary doctrines that need to be developed to ensure that the confrontation that is provided in fact satisfies the requirements of the Confrontation Clause. A public accusation is not simply an after-thought of the right; rather, both it and cross-examination are central components. Whether confrontation occurs in the present proceeding or a prior one, a public accusation is required at one point in the case. When the witness is unavailable at trial and

⁴¹ Justice Marshall put my test in slightly different form. He argued that the prosecution would not have been so ineffectual and derelict in its efforts to secure the presence of the witness if it had not had her favorable preliminary hearing testimony to offer in her absence. *See id.* I suggest generalizing the test he would have applied in *Roberts*.

confrontation is satisfied by what occurred in the prior proceeding, the government must likewise present the accuser for the opportunity for cross-examination at that proceeding. The government must put something at risk, and the hearing must have consequences. To claim the defendant has been confronted by providing an opportunity for cross-examination which will likely only harm the defendant by allowing otherwise inadmissible incriminating evidence to be admitted at trial is inadequate to satisfy the Confrontation Clause.

The range of issues left open by *Crawford* is enormous. It will take sustained effort to develop a full set of doctrines that both protect the defendant's rights and facilitate justice. I believe efforts like this excellent Symposium and, I hope, my Comment are steps in that direction.